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No. 404

# In the Supreme Court of the United States

OCTOBER TERM, 1961

SALVATORE ANNUNZIATO, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (R.[1] 149–167; Pet. App. 3–20) has not yet been reported.

### JURISDICTION

The judgment of the court of appeals was entered on July 26, 1961 (R. 168). A petition for rehearing (R. 170–174) was denied on August 14, 1961 (R. 176). The petition for a writ of certiorari was filed on September 12, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "R." refers to the printed record, consisting of the appendices to the parties' briefs in the court of appeals and the proceedings in that court.

## QUESTIONS PRESENTED

1. Whether a witness before a grand jury who was warned of, and exercised, his right not to incriminate himself is entitled to dismissal of an indictment later returned against him because he was not told that he was an object of the grand jury's investigation.

2. Whether a trial judge may in his discretion decline to inquire, on *voir dire* examination of the jury panel, whether any members of the panel are members of or contributors to any organization having law enforcement as an object.

3. Whether inadmissible hearsay testimony was received at the trial.

4. Whether it was error for the trial judge, in determining whether an F.B.I. agent's 800-word report of a three-hour interview with a government witness, which the witness never saw or adopted, was producible under 18 U.S.C. 3500, to fail to call the agent who wrote the report for examination as to the circumstances of its preparation; and whether, in any event, the failure to call the agent was prejudicial in this case.

5. Whether a defendant can complain on appeal of the failure of the trial judge to order delivered to him a document which does not appear to have been producible under 18 U.S.C. 3500 and for which he never asked.

## STATUTES INVOLVED

Section 186 of Title 29 of the United State
provided in pertinent part at the time of the
involved (July 3, 1957):[2]

> (a) It shall be unlawful for any emp
> pay or deliver, or to agree to pay or
> any money or other thing of value to a
> resentative of any of his employees v
> employed in an industry affecting comm
>
> (b) It shall be unlawful for any rep
> tive of any employees who are employe
> industry affecting commerce to receiv
> cept, or to agree to receive or accept, f
> employer of such employees any m
> other thing of value.
>
> * * * *
>
> (d) Any person who willfully viola
> of the provisions of this section shall, u
> viction thereof, be guilty of a misdemea
> be subject to a fine of not more than $1
> to imprisonment for not more than one
> both.
>
> * * * *

Section 3500 of Title 18 of the United Sta
provides in pertinent part:

> * * * *
>
> (b) After a witness called by the
> States has testified on direct examina
> court shall, on motion of the defendan
> the United States to produce any state
> hereinafter defined) of the witness in

[2] The section was subsequently amended (in respect
material) by the Labor-Management Reporting and
Act of 1959, 73 Stat. 519, 537.

session of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * * * *

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

**STATEMENT**

Count 1 of a two-count indictment, returned May 25, 1960 in the United States District Court for the District of Connecticut, charged petitioner with having received $300 on or about July 3, 1957 from the Terry Contracting Company (a firm whose employees he represented), in violation of 29 U.S.C. 186 (b) and (d), *supra* (R. 1; Pet. App. 4). Count 2, which charged the receipt to a separate payment, was dismissed pursuant to a *nolle prosequi* and is no

longer involved.[3] Following a trial by jury, petitioner was found guilty (R. 143). He was sentenced to one year's imprisonment and to pay a fine of $2,500 and the costs of the prosecution (R. 2). The Court of Appeals for the Second Circuit affirmed (R. 149–168; Pet. App. 3–20).

The evidence adduced by the government may be summarized as follows:

In 1957 the Terry Contracting Company, a New York City concern, was engaged in constructing the Bridgeport Harbor Bridge, part of the Connecticut Turnpike (R. 3–4, 34, 39–40, 45). Petitioner was business agent for a local of the International Union of Operating Engineers, members of which were engaged in work on the site (R. 35–36).

On or about July 3, 1957, at about 11 a.m., petitioner went to the office of the timekeeper for the bridge-construction project, located in a trailer, and inquired of the timekeeper, Walter Haas, and the job superintendent, Arthur Van Dommellen, whether "someone from New York was there to see him" (R. 3–4, 7, 34, 37). Van Dommellen told petitioner that no one from New York was there then, but that he "expect[ed] Mr. Mayhew later" (R. 37). William Mayhew, to whom Van Dommellen referred, was the Terry Company's chief engineer, in general charge of all its

[3] Prior to trial the government filed an information charging petitioner with the same offense stated in count 2 of the indictment. Without objection, count 2 of the indictment was dismissed and count 1 and the information were tried together. The jury acquitted petitioner of the charge contained in the information (R. 1; Pet. App. 4–5).

construction projects (R. 39–40). Petitioner told Van Dommellen that he would "wander around" and "be back" (R. 37).

A short while later, Mayhew arrived at the construction site with Philip Wolf, the chief estimator for the Terry Company (R. 7, 33, 41). Petitioner, returning to the office, was told by Van Dommellen that "Mr. Mayhew and Mr. Wolf were in the office, if he wanted to see them" (R. 37). Petitioner entered the office and introduced himself to Mayhew (R. 41–42). Mayhew "attempted to introduce" petitioner to Wolf and invited him to a diner for a cup of coffee. Petitioner declined, saying that he was "not interested in * * * coffee" and that "This ain't no social call" (R. 8–9, 42). Mayhew, accordingly, attended promptly to "the business [he] had with him" (R. 42)—the delivery of a sealed, three-by-five-inch, manila envelope which the president of the Terry Company, Harry Terker, had given to Mayhew in New York on the previous day with the request that he deliver it to petitioner (R. 8–9, 42–46, 99). Although Mayhew had not seen the contents of the envelope, he could tell from its "bulk" that it had "something in" it, between three-eighths of an inch and half an inch thick, which could be "flex[ed]" (R. 44–45, 47). Petitioner took the envelope and left (R. 43).

Mayhew testified that Harry Terker, who was deceased at the time of the trial (R. 47), gave him the envelope in the company's New York offices with the request that he deliver it to "the business agent for the operating engineers" on the Bridgeport project (R. 45, 99). Terker, in response to Mayhew's inquiry

as to the purpose of the envelope, said that it was "for a commitment that [he had] made." Mayhew told Terker he "prefer[red] not to carry the envelope", but agreed to do so when Terker persisted in his request (R. 99).

Ralph Cohen, comptroller of the Terry Company, identified a cash voucher for $300, dated June 28, 1957, bearing Mayhew's name and the notation "Job No. 719, Sundries" (R. 55–56, 59–61). The voucher was in Cohen's handwriting and was a company record, kept in the regular course of business (R. 59). Cohen identified "Job No. 719" as the Bridgeport Harbor Bridge project (R. 61). The voucher bore the further notation "Receipt of the above is hereby acknowledged", followed by Cohen's initials (R. 61). The document evidenced on its face, Cohen testified, that $300 in company funds had been given to Mayhew to enable Mayhew "to pay a sundry expense on the job", which, to Cohen's knowledge, meant "a payment to somebody for some purpose" (R. 61–62, 64). Cohen did not deliver the money to Mayhew directly, Cohen testified, since if he had done so he would have required Mayhew to sign the voucher, and Mayhew had not signed it (R. 65). Rather, Cohen testified, he put the money in an envelope and gave it to Harry Terker, the president, whom Cohen did not always require to sign the voucher in such instances (R. 65, 69). Cohen further testified that Terker had told him that the purpose of the $300 was "[f]or Mr. Mayhew's use to pay somebody * * * on the job" (R. 71).

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Richard Terker, the secretary-treasurer of the Terry Company at the time of the offense and the son of Harry Terker (R. 77), testified to a luncheon conversation he had with his father in the latter part of June or the early part of July 1957 in which his father told him that petitioner had asked him for money in connection with the Bridgeport Harbor Bridge project and that he had agreed to send petitioner some (R. 80). The sum mentioned by his father, Richard testified, was $250 (R. 84).

No evidence was adduced on behalf of the defense.

**ARGUMENT**

1. Petitioner contends (Pet. 7–9) that the trial court erred in refusing to dismiss the indictment on the ground that when he was called before the grand jury he was a "de facto" defendant, "[m]arked for prosecution", but was not so advised. Assuming *arguendo* that he was a target of the grand jury inquiry, there is no merit to the contention.

As pointed out by the court of appeals (R. 153; Pet. App. 7), and as petitioner now concedes (Pet. 7), he was advised of his right to remain silent before he was taken into the grand jury room on his first appearance before that body, and on his second and final appearance he claimed his privilege against self-incrimination with the first question and repeated the claim with every question that could possibly be incriminating. His rights as a witness who was himself an object of the grand jury's investigation were thus

fully protected.[4] There was no need for the government attorney to expand his warning by stating explicitly that petitioner was under investigation, since the warning as worded carried this reasonable implication. This is not a case, moreover, in which the grand jury testimony of a witness, against whom an indictment is subsequently returned, is used or sought to be used against him at his trial. Cf. *United States* v. *Keenan*, 267 F. 2d 118, 126 (C.A. 7), certiorari denied, 361 U.S. 863; *Costello* v. *United States*, 255 F. 2d 389, 399–400 (C.A. 8), certiorari denied, 358 U.S. 830; *Connelly* v. *United States*, 249 F. 2d 576, 581 (C.A. 8), certiorari denied, 356 U.S. 921. What petitioner seeks is outright dismissal of the indictment simply because of the alleged violation of his rights as a grand jury witness who was himself suspect. In no event was he entitled to this. *United States* v. *Cleary*, 265 F. 2d 459 (C.A. 2), certiorari denied, 360 U.S. 936; *United States* v. *Scully*, 225 F.

[4] Cf. *United States* v. *Keenan*, 267 F. 2d 118, 126 (C.A. 7), certiorari denied, 361 U.S. 863; *United States* v. *Cleary*, 265 F. 2d 459 (C.A. 2), certiorari denied, 360 U.S. 936; *United States* v. *Pile*, 256 F. 2d 954 (C.A. 7); *Costello* v. *United States*, 255 F. 2d 389, 399–400 (C.A. 8), certiorari denied, 358 U.S. 830; *Connelly* v. *United States*, 249 F. 2d 576, 581 (C.A. 8), certiorari denied, 356 U.S. 921; *United States* v. *Klein*, 247 F. 2d 908, 920–921 (C.A. 2), certiorari denied, 355 U.S. 924; *United States* v. *Parker*, 244 F. 2d 943, 945-949 (C.A. 7), certiorari denied, 355 U.S. 836; *United States* v. *Scully*, 225 F. 2d 113 (C.A. 2), certiorari denied, 350 U.S. 897; *United States* v. *Benjamin*, 120 F. 2d 521, 522 (C.A. 2); *Mulloney* v. *United States*, 79 F. 2d 566, 578–580 (C.A. 1), certiorari denied, 296 U.S. 658; *O'Connell* v. *United States*, 40 F. 2d 201, 205 (C.A. 2), certiorari dismissed, 296 U.S. 667; *United States* v. *Kimball*, 117 Fed. 156 (C.C.S.D.N.Y.).

2d 113 (C.A. 2), certiorari denied, 350 U.S. 897. Cf. *Holt* v. *United States*, 218 U.S. 245, 247–248; *Costello* v. *United States*, 350 U.S. 359; *Lawn* v. *United States*, 355 U.S. 339, 349–350.

2. There is likewise no merit in the contention (Pet. 9–11) that it was error for the trial judge to decline to ask the members of the petit jury panel, upon *voir dire*, whether any of them were members of or contributors to any organization having law enforcement as its object. The trial court has a broad discretion as to the questions to be asked prospective jurors. *Aldridge* v. *United States*, 283 U.S. 308, 310. While this discretion may, of course, be abused (see *id.*, at 310–315; *Sellers* v. *United States*, 271 F. 2d 475 (C.A.D.C.)), there was no abuse here. It is one thing, as noted by the court of appeals (R. 154; Pet. App. 8), for a judge to refuse to inquire whether any prospective juror belongs to an organization having as its special object the enforcement of the particular law under which the accused has been indicted. Cf. *Beatty* v. *United States*, 27 F. 2d 323 (C.A. 6) (prohibition); *Bailey* v. *United States*, 53 F. 2d 982 (C.A. 5) (same). It is another where the inquiry sought by the defendant relates to membership in an organization devoted to the improvement of law enforcement generally, which is the responsibility of every citizen. Petitioner, as the court below properly concluded (R. 154; Pet. App. 8), "cast his net too wide".

3. Petitioner contends (Pet. 11–12) that Richard Terker's testimony that his father told him, some time prior to the alleged unlawful receipt of money by petitioner, that petitioner had asked him for money and

that he had agreed to send petitioner some (*supra*, p. 8) was hearsay and inadmissible. We submit that the court of appeals correctly held (R. 155–162; Pet. App. 9–16) that this testimony was properly admitted both as a "declaration of the father's intention" and as a "declaration of a co-conspirator" (R. 155; Pet. App. 9).[5]

The existence of a design or plan to do an act is admissible to show that the act was probably done as planned, and, under a well recognized exception to the hearsay rule, the plan or design may be shown by the person's own statements as to its existence. 6 Wigmore, *Evidence* (3d ed., 1940), § 1725; *Mutual Life Insurance Co.* v. *Hillmon*, 145 U.S. 285, 295–296.

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[5] Petitioner's statement that "virtually the entire case against [him] was an edifice built of hearsay testimony" (Pet. 11–12) is unfounded. The only testimony besides Richard Terker's which has been challenged (see R. 154; Pet. App. 8) was (1) Mayhew's testimony that Harry Terker asked him to take the envelope which he received from Terker to Bridgeport so that Terker might keep a commitment he had made to petitioner (*supra*, pp. 6–7) and (2) Cohen's testimony that Harry Terker told him to draw $300 "[f]or Mr. Mayhew's use to pay somebody * * * on the [Bridgeport] job" (*supra*, p. 7). The court below rightly held that these statements "fall so clearly within Professor Morgan's sixth class [of utterances admissible as *res gestae*], 'Cases in which the utterance is contemporaneous with a nonverbal act, independently admissible, relating to that act and throwing some light upon it' [citing Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 Yale L. Journ. 229, 236 (1922)], * * * that we do not need here to consider other possible grounds of admissibility" (R. 154–155; Pet. App. 8–9). See *Beaver* v. *Taylor*, 1 Wall. 637, 642. Since petitioner "does not intend to press these points [the admissibility of Mayhew's and Cohen's testimony] seriously" (Pet. 12), there is no occasion to elaborate the matter further.

therefore admissible under the rule that acts done or statements made by one conspirator during the existence of the conspiracy and in furtherance of its object, are admissible against all. *Glasser v. United States*, 315 U.S. 60, 74; *Wiborg v. United States*, 163 U.S. 632, 658; *Nye & Nissen v. United States*, 336 U.S. 613, 619. Parker's statement was not a "merely narrative [declaration] of a past fact" (*United States v. Goodwin*, 129 F. 2d 1009, 1013 (C.A. 2); cf. *Van Riper v. United States*, 13 F. 2d 961, 967 (C.A. 2), certiorari denied sub nom. *Jackson v. United States*, 273 U.S. 762; *United States v. Campagna*, 110 F. 2d 324, 330 (C.A. 2), certiorari denied, 321 U.S. 807). As observed by the court of appeals (R. 162; Pet. App. 10), "[e]ven the instant payment to Annunzato lay in the future; moreover, it might well have been important to Harry's objectives that his son, then secretary-treasurer and later president of the company, should know of his father's policy if questions should ever arise or if a similar problem with respect to Annunzato should be presented in the future". It is immaterial, as the court noted (R. 158; Pet. App. 12), that the indictment did not charge a conspiracy. It is enough if the evidence, other than that whose admissibility is challenged discloses one. *Nash v. United States*, 229 U.S. 373, 377; *Pinkerton v. United States*, 328 U.S. 640, 647. Cf. *Dealy v. United States*, 152 U.S. 539, 542; *Logan v. United States*, 144 U.S. 263, 309.

4. During the cross-examination of the witness Haas, the trial judge, on the basis of his inspection of an F.B.I. agent's report of an interview with the witness, ruled that the report did not come within the "Jencks" Act, 18 U.S.C. 3500

Harry Terker's statement to his son, to the extent that it represented a statement of the father's intention to send petitioner money, *was* plainly admissible under this rule. The only question, as noted by the court of appeals (R. 155; Pet. App. 9), is "whether a different result is demanded because here the declarant accompanied his statement of future plan *with* an altogether natural explanation of the reason, in the very recent past, that had prompted it". The court, *we* submit, rightly held that the result should be the same. For, *while* "inclusion of a past event motivating the plan adds the hazard of defective perception and memory to that of prevarication," "this does not demand exclusion or even excision, at least *when*, as here, the event is recent, is *within* the personal knowledge of the declarant and is so integrally included in the declaration of design as to make it unlikely in the last degree that the latter would be true and the former false" (R. 157; Pet. App. 11).

The alternative basis of admissibility is equally capable of supporting the admission of Harry Terker's statement. If Terker *was* party to an agreement *with* petitioner to pay petitioner money—and this *was* clearly inferable from evidence other than that challenged, particularly *Maybew's* and Colon's testimony (see *supra*, pp. 6–7)—then Terker, as the court rightly concluded (R. 158–161; Pet. App. 12–15), *was* a co-conspirator *with* petitioner in a scheme to *violate* the statute under *which* petitioner *was* indicted.* Terker's statement to his son was

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* 29 U.S.C. 186 (*supra*, p. 3) prohibits equally the payment of money by the employer (subsection (a)) and its receipt by the employees' representative (subsection (b)).

(*supra*, pp. 3–4). Petitioner contends (Pet. 13–14) that the judge, although he was not requested to do so, should have called the agent for questioning as to the circumstances of the preparation of the report. The court of appeals held that it was unnecessary to consider whether the judge should have called the agent because in any event the error was harmless—for the reason that the report (which the court of appeals examined) had no impeachment value at all (R. 163–165; Pet. App. 16–19).[7]

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[7] As noted by the court of appeals (R. 164–165; Pet. App. 18), both the majority and dissenting opinions in *Rosenberg* v. *United States*, 360 U.S. 367, 371, 375, reject the view that the harmless error doctrine can never apply to statements producible under 18 U.S.C. 3500. In that case the error—failure to require production of a letter written by the witness-victim to the United States Attorney—was held harmless because the substance of the letter's contents had been otherwise made available to the defense. But there is no reason to distinguish such a situation from one in which inspection of an erroneously withheld document shows that it could not have aided the defense because it was lacking in impeachment value. Application of the harmless error principle in the latter situation does not, as petitioner argues (Pet. 13), "[violate] the basic concept behind the decision in *Jencks*." The *Jencks* decision, 353 U.S. 657, established the principle—now confirmed by the "Jencks" Act—that laying a foundation of inconsistency between a witness's testimony and the prior statement of the witness is unnecessary. But this is not to say that the error of withholding a producible statement would be necessarily prejudicial. If the appellate court's examination of the withheld document convinces the court that production could not have helped the accused because it was wholly lacking in impeachment value, the harmless error doctrine is as applicable as in any other situation in which error has not been prejudicial.

The agent's report is on file with the Clerk of this Court, should the Court desire to examine it.

Although we agree with the court that any error was harmless, we submit that there is no need to reach the question of harm because the failure of the judge to take the unsolicited action of calling the F.B.I. agent was not error.

Haas was interviewed twice by the Federal Bureau of Investigation—on September 24, 1958, and on October 20, 1960 (R. 12, 13, 15, 23–24). On the second occasion he signed a three-page statement, which was delivered to the defense and is not involved (R. 10, 19). On the day following the first interview, September 25, 1958, agent Clemente dictated a report of the interview, which Haas never saw (R. 13, 22). The report, dated September 29, 1958 (evidently the date the agent signed and forwarded it), consisted of slightly more than three single-spaced typewritten pages, approximately 800 words (R. 12, 13, 163; Pet. App. 17). The interview which was the subject of the report lasted approximately three hours (R. 17–18).

At the trial, the government attorney, after delivering to the defense the 1960 statement signed by the witness (R. 10), advised the court and defense counsel of the existence of the agent's report of the 1958 interview, stated that in the government's view the report was not producible under 18 U.S.C. 3500 because it was "merely the agent's summary of conversations with the witness", and delivered the report to the court for its inspection (R. 11–13). The court, noting that the report "appears to be a statement almost on all fours with the type

of statement * * * referred to in the Palermo case" (*Palermo* v. *United States*, 360 U.S. 343), ruled that it was not producible (R. 13).

Counsel for the defense made no request for leave to examine the agent who prepared the report, nor did he ask that the prosecutor or the court interrogate the agent.* The defense attorney's only request was that he be permitted to interrogate the witness to determine whether he had ever "adopted" the agent's report (R. 14). This request was granted (R. 15) and the witness was questioned to this end (R. 15–25). The defense attorney sought to ascertain whether the witness had said anything to the interviewing agents during the 1960 interview which might be construable as an adoption of anything contained in the 1958 report (R. 16, 17, 18, 23, 24). He was not successful in establishing that there had been any such adoption (*ibid.*). During this inquiry the witness testified that he "believe[d]" that the interviewing agent at the 1958 interview took notes (R. 15), but defense counsel made no attempt to ascertain, from the government or any other source, whether notes in fact were taken or, if so, how complete they were or whether they were still in existence. Following counsel's examination, the court repeated its ruling that the agent's 1958 report was not producible (R. 25).

This ruling was correct. The agent's report summarized in approximately 800 words statements made by the witness in a three-hour interview. It was possible, consequently, for the trial court to determine

* Questioning the agent was mentioned by no one during the proceedings.

from inspection that the report evidenced "substantial selection of material" and for that reason was not producible. *Palermo* v. *United States*, 360 U.S. 343, 352–353. In *Palermo*, where the report summarized in 600 words statements made by a witness at a conference lasting 3½ hours (360 U.S. at 355, note 12), the decision that the document was not producible was made solely on the basis of inspection. The Court, indeed, while acknowledging that in some instances extrinsic evidence "might be deemed relevant to assist the court's determination", stated that "[i]n most cases the answer will be plain from the statement itself." 360 U.S. at 355. Here, moreover, it is undisputed that the report was dictated on the day following the interview. This fact also served to remove it from the purview of 18 U.S.C. 3500 (because of the contemporaneous recordation requirement of subsection (e)(2) (*supra*, p. 4))—unless the agent took "complete notes" during the interview and incorporated the witness's language, in substantially verbatim form, into his report. See 360 U.S. at 353.[9]

But even if it be assumed, *arguendo*, that, notwithstanding these considerations, further pertinent information might have been obtained from the agent, we submit that it was clearly not error for the trial court to fail to call him. On its face, the report appeared

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[9] As noted *supra*, p. 16, Haas "believe[d]" that the agent took notes during the interview, but whether or not the agent in fact did so—and, if he did, how "complete" the notes were, and whether, if "complete", they were fully incorporated in the agent's report—are matters which were not pursued by defense counsel and do not appear.

beyond the coverage of 18 U.S.C. 3500, and petitioner's counsel did not suggest interrogation of the agent or that anything would be gained by calling him. *Campbell* v. *United States*, 365 U.S. 85, on which petitioner relies (Pet. 13), is distinguishable. In that case, not only did defense counsel, unlike defense counsel here, indicate a desire that the agent be called for questioning, but there was a reason for calling the agent which was wholly absent here. The witness had admitted that he had adopted a statement of the agent, which the government had been ordered to produce (but was unable because it did not have in its possession a statement of the type the witness described), and the principal reason for calling the agent was to determine whether the report in controversy was the statement referred to by the witness or a copy of it. 365 U.S. at 87–95. It was, indeed, in all probability, the fact that this aspect of the *Campbell* case was absent here which explains why the defense attorney in this case, unlike counsel in *Campbell*, did not request that the agent be called.

5. Petitioner's final contention—that the trial court should have ordered the delivery to the defense of an F.B.I. agent's report of an interview with Richard Terker, notwithstanding that the defense did not request its production (Pet. 14)—is also untenable. Even if it appeared that the report was of a type pro-

ducible under 18 U.S.C. 3500—and it does not [10]—the failure of the defense to ask for the report, the existence of which was acknowledged by the government (R. 82), is, as the court of appeals held (R. 166; Pet. App. 20), a complete answer to this contention. 18 U.S.C. 3500(b) (*supra*, pp. 3-4).

Petitioner's attempt to excuse the defense's failure to ask for the report on the ground that the trial court, following a "heated exchange" concerning "handwritten notes taken during the interview" which was the subject of the report (see note 10), "abruptly cut off the subject from inquiry" and "put an end to defendant's quest" (Pet. 14) is based on an inaccurate representation of the record. The subject of the "exchange" was a proposal by defense counsel to "claim an inference" before the jury from the fact that the agents' notes, taken during the interview, were subsequently destroyed (Pet. App. B, p. 22). Government counsel, pointing out that the

[10] It appears that the report was an ordinary memorandum of interview—similar to that pertaining to witness Haas (*supra*, p. 15)—in which the interviewing agent or agents reported statements orally made by the witness. See R. 82. In this instance the interview lasted from two to two and a half hours (R. 81). In view of the defense's failure to request the production of the report, there is no occasion to consider whether, if it had been asked for, it would have been producible as "secondary evidence of the contents of" certain longhand notes taken by the interviewing agents—later routinely destroyed (see Pet. App. B, p. 22)—which the witness testified he had occasion to "look over" following the interview and which he said he "imagine[d]" were accurate. See opinion below at R. 166, Pet. App. 19. Cf. *United States* v. *Thomas*, 282 F. 2d 191, 194-195 (C.A. 2).

notes were destroyed "in the usual course of business by the F.B.I.," opposed this proposal (*id.*, pp. 22–23). The court directed that there be no argument between counsel in the jury's presence with respect to "what inferences they can or cannot draw" from the destruction of the notes (p. 23), and, following further discussion (pp. 23–25), directed that "that subject * * * be dropped" (p. 25). No other limitation was imposed upon counsel. The court, indeed, emphasized to counsel their complete liberty of action as to any aspect of the case (including the calling of witnesses), subject to the foregoing specific limitation (pp. 23, 24–25).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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